CITY OF YAKIMA

LEGAL DEPARTMENT

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MEMORANDUM

October 2, 2013

TO: Honorable Mayor and City Council
Tony O'Rourke, City Manager
Jeff Cutter, City Attorney

FROM: Mark Kunkler, Senior Assistant City Attorney

SUBJECT: Initiative 502 – Marijuana – Land Use Regulation – Preemption Issues

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On November 6, 2012, voters in the State of Washington approved Initiative 502. This initiative legalized possession and use of marijuana (one ounce or less) and established a mechanism for state licensure and regulation of marijuana production, processing and retailing.

Licensing of the legalized marijuana production, processing and retailing is vested in the Washington State Liquor Control Board (LCB). Under Initiative 502, the LCB has until December 1, 2013 to promulgate rules applicable to the licensing and regulation of marijuana. However, the LCB is on track to issue its final rules on November 16, 2013, and has announced that it will begin receiving applications for marijuana production, processing and retailing licenses on November 18, 2013, and will begin issuing licenses on December 1, 2013.[1]

Meanwhile, the federal Controlled Substances Act still categorizes marijuana as a Schedule I controlled substance. Production, distribution, possession and use of

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[1] "I-502 Implementation Timeline," WSLCB, www.liq.wa.gov (as of September 17, 2013). Proposed WAC 314-55-081(4) provides for a "30-day window" to apply for retail licenses:

> (4) The board will initially limit the opportunity to apply for a marijuana retailer license to a thirty-day calendar window beginning with the effective date of this section. In order for a marijuana retailer license application to be considered it must be received no later than thirty days after the effective date of the rules adopted by the board. The board may reopen the marijuana retailer application window after the initial evaluation of the applications received and at subsequent times when the board deems necessary.

marijuana for any purpose are unlawful. Under court decisions, local business licensing or permitting schemes for medical marijuana have been found to be preempted by the federal law,[2] but a recent decision by the California Supreme Court upheld a city's right to ban medical marijuana dispensaries under its land use jurisdiction.[3]

On August 29, 2013, the U.S. Attorney's office issued a memorandum entitled "Guidance Regarding Marijuana Enforcement." The memorandum reiterated the U.S. Attorney's position that marijuana remains a controlled substance under the federal *Controlled Substances Act*. The memorandum announced a policy of "prosecutorial discretion" when considering enforcement actions in states that have legalized possession and use of recreational marijuana. If the state maintains a "strong and effective regulatory system" for recreational marijuana that prevents illegal distribution to minors and prevents introduction of illegal marijuana into interstate commerce, the U'S. Attorney's office will exercise its "discretion" not to prosecute. However, the memorandum also makes clear that the federal government may exercise its enforcement and prosecutorial powers in any case where it finds federal priorities warrant such action.

The City of Yakima has adopted land use code amendments stating that any use that is illegal under local, state or federal law shall not be allowed in the city. YMC 15.01.035(A). This code includes a specific subsection providing that the prohibition also applies to medical marijuana dispensaries and collective gardens. YMC 15.01.035(B).

Issue Presented: What authority does a city retain to regulate licensing and location of marijuana producers, processors and retailers?

Summary Answer: The new law does not contain a specific provision expressly providing that the State of Washington is "preempting" the field of regulation, but the comprehensive nature of the new state law regarding licensure and permitting of production, processing and retailing will likely be found to preempt the ability of local jurisdictions to issue regulatory business licenses for these functions. Moreover, if the city implements a licensing scheme for business engaged in the functions of producing, processing and/or retailing marijuana, it runs a risk that those city employees engaged

[2] In fact Governor Gregoire vetoed provisions of the Medical Use of Marijuana Act (MUMA) on the threat from the U.S. Attorney's office that the proposed state licensing of medical marijuana dispensaries was a violation of the federal Controlled Substances Act, and that state employees charged with licensing such activities could face potential prosecution for "aiding and abetting" a violation of the federal law.

[3] *City of Riverside v. Inland Empire Patients Health and Welfare Center,* 56 Cal.4th 729, 300 P.3d 494 (2013).

in such licensing activities may be found to be "aiding and abetting" a violation of federal law.

Nothing in the new marijuana law expressly preempts a city's ability to regulate land use or zoning of facilities for production, processing and retailing of marijuana. The new law contains "proximity" limitations restricting marijuana production, processing and retailing (and "advertising") no closer than 1,000 feet from schools, libraries, parks and other public places. However, proposed Washington Administrative Code (WAC) rules include provisions recognizing the ability of cities to enforce their zoning and safety codes.

Current city code provisions ban any use that is illegal under local, state or federal law. As such, this code provision operates as a ban against marijuana producers, processors and retailers within the city limits.

With these parameters in mind, the following options are available:

(a) Maintain Status Quo. Status quo means that YMC 15.01.035 remains in effect as originally adopted. Thus, no use that is illegal under local, state or federal law will be allowed in the city. This code section contains a specific ban for medical marijuana dispensaries and collective gardens, but no specific language is used to ban production, processing and retailing of "recreational marijuana."

(b) Amend Current Code to Ban Production, Processing and Retailing of Recreational Marijuana. This option entails an amendment of YMC 15.01.035 to add a new subsection specifically banning the production, processing and retailing of marijuana within the City of Yakima. This is preferable to simply maintaining the status quo discussed in option (a) above in that it provides further clarity and precision and is consistent with the current subsection banning medical marijuana dispensaries and collective gardens. This option entails an amendment to Title 15 YMC and would require public hearings before the Planning Commission and City Council. It would be advisable to adopt the amendment to be effective on or before November 30, 2013.

(c) Develop and Adopt Land Use (Zoning) Controls for Production, Processing and Retailing of Recreational Marijuana and/or Medical Marijuana. The city may develop zoning codes defining areas where marijuana production, processing and/or retailing may be conducted. For example, it is possible to limit such activities to industrial or commercial zones, or an overlay zone within an industrial zone, or other areas. Licensed marijuana production, processing and

retailing would remain subject to the 1,000-foot limitations of Initiative 502, and would also be subject to the city's designated zoning requirements. Likewise, the City Council may wish to consider appropriate zoning designations for medical marijuana dispensaries and collective gardens. If any of these zoning options are considered, amendments to the city's zoning codes (Title 15 YMC) will require public hearings before the Planning Commission and City Council. Because the LCB indicates it will begin issuing marijuana production, processing and retail licenses on December 1, 2013, any ordinance amending the city's zoning codes would have to be adopted so as to be effective no later than November 30, 2013.

I. Discussion

A. Initiative 502

The Initiative decriminalizes possession and use, by a person twenty-one years or older, of marijuana in the following amounts:

(a) One ounce of useable marijuana;
(b) Sixteen (16) ounces of marijuana-infused product in solid form; or
(c) Seventy-two (72) ounces of marijuana-infused product in liquid form.

I-502 Sections (15), (20). The law also decriminalizes production, processing, distribution and sale by any "marijuana producer," "marijuana processor," or "marijuana retailer" licensed by the LCB. I-502 Section 19(3). New Section 21 provides that any person who opens a package containing marijuana, or consumes marijuana, "in view of the general public" shall be guilty of a Class 3 infraction per Chapter 7.80 RCW.

"Marijuana producer" means "a person licensed by the state liquor control board to produce and sell marijuana at wholesale to marijuana processors and other marijuana producers." RCW 69.50.101(u) (I-502 Section 2).

"Marijuana processor" means "a person licensed by the state liquor control board to process marijuana into useable marijuana and marijuana-infused products, package and label useable marijuana and marijuana-infused products for sale in retail outlets, and sell useable marijuana and marijuana-infused products at wholesale to marijuana retailers." RCW 69.50.101(t) (I-502 Section 2).

"Marijuana retailer" is defined as "a person licensed by the state liquor control board to sell useable marijuana and marijuana-infused products in a retail outlet." RCW 69.50.101(w)(I-502 Section 2).

"Retail outlet" is defined as "a location licensed by the state liquor control board for the retail sale of useable marijuana and marijuana-infused products." RCW 69.50.101(ff) (I-502 Section 2).

New Section 6(8) and New Section 18 of I-502 set forth some limitations:

> NEW SECTION. **Sec. 6.**
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> (8) The state liquor control board shall not issue a license for any premises within one thousand feet of the perimeter of the grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.
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> NEW SECTION. **Sec. 18.** (1) No licensed marijuana producer, processor, or retailer shall place or maintain, or cause to be placed or maintained, an advertisement of marijuana, useable marijuana, or a marijuana-infused product in any form or through any medium whatsoever:
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> (a) Within one thousand feet of the perimeter of a school grounds, playground, recreation center or facility, child care center, public park, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older;
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> (b) On or in a public transit vehicle or public transit shelter; or
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> (c) On or in a publicly owned or operated property.
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> (2) Merchandising within a retail outlet is not advertising for the purposes of this section.
>
> (3) This section does not apply to a noncommercial message.
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> (4) The state liquor control board shall fine a licensee one thousand dollars for each violation of subsection (1) of this section. Fines collected under this subsection must be deposited into the dedicated marijuana fund created under section 26 of this act.

(Emphasis added). Section 19(3) of I-502 provides:

> (3) The production, manufacture, processing, packaging, delivery, distribution, sale, or possession of marijuana in compliance with the terms set forth in sections 15, 16, or 17 of this act shall not constitute a violation of this section, this chapter, or any other provision of Washington state law.

(Emphasis added). Section 19 amends RCW 69.50.401, which sets forth the criminal penalties for illegal possession and use of controlled substances. In its context, the statement above, that lawful production, processing, possession and use of marijuana shall not constitute a violation of "any other provision of Washington state law," speaks to other state laws imposing criminal penalties.

Section 10 of the Initiative requires the Liquor Control Board to adopt rules by December 1, 2013 implementing the provisions of the Initiative, including the following:

> NEW SECTION. **Sec. 10.** The state liquor control board, subject to the provisions of this act, must adopt rules by December 1, 2013, that establish the procedures and criteria necessary to implement the following:
>
> (1) Licensing of marijuana producers, marijuana processors, and marijuana retailers, including prescribing forms and establishing application, reinstatement, and renewal fees;
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> (2) Determining, in consultation with the office of financial management, the maximum number of retail outlets that may be licensed in each county, taking into consideration:
>
> (a) Population distribution;
> (b) Security and safety issues; and
> (c) The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market;…

Additional rules are required to determine the amounts of marijuana and marijuana-infused products that can be held by marijuana producers, processors and retailers. Rules must be developed regarding packaging, THC levels, classes of marijuana and marijuana-infused products, establishing "reasonable time, place and manner" restrictions regarding advertising, times for transport and delivery of marijuana and marijuana-infused products, and establishing criteria for testing laboratories.

New Section 13 pertains to retail outlets:

> NEW SECTION. **Sec. 13.** There may be licensed, in no greater number in each of the counties of the state than as the state liquor control board shall deem advisable, retail outlets established for the purpose of making useable marijuana and marijuana-infused products available for sale to adults aged twenty-one and over. Retail sale of useable marijuana and marijuana-infused products in accordance with the provisions of this act and the rules adopted to implement and enforce it, by a validly licensed marijuana retailer or retail outlet employee, shall not be a criminal or civil offense under Washington state law.

Also, New Section 10 further describes the methodology to be used by the LCB to determine the "maximum number of retail outlets that may be licensed in each county:"

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> (b) Security and safety issues; and
> (c) The provision of adequate access to licensed sources of useable marijuana and marijuana-infused products to discourage purchases from the illegal market;…

(Emphasis added). This section does not, by its terms, limit the ability of a city to impose zoning restrictions on the location of such establishments. Also, it is important to note that the law does not mandate that marijuana retail outlets be located in any city; rather, the law requires the LCB to determine a "maximum" number of retail outlets "that *may* be licensed in each county."

It is also important to note that there is no provision in Initiative 502 limiting the number of licenses for marijuana *production* and/or *processing* operations within each county. Thus, while the number of marijuana *retail outlets* is subject to a maximum number per county, there is no similar limitation for production or processing.

Sections 26 and 27 of Initiative 502 deal with revenues. Section 26 establishes a "dedicated marijuana fund," which shall consist of "all marijuana excise taxes, license fees, penalties, forfeitures, and all other moneys, income or revenue received by the state liquor control board from marijuana-related activities."

Section 27 imposes a 25% excise tax on marijuana production wholesale price, a 25% excise tax on processing wholesale price, and a 25% excise tax on retail sales. The revenues are to be deposited in the Dedicated Marijuana Fund. Operations of the LCB will be funded out of proceeds from the fund. Additionally, the law provides for disbursements to various state agencies such as DSHS to fund programs and studies.

Section 27 provides that the excise taxes on retail sales are "separate and in addition to general state and local sales and use taxes that apply to retail sales of tangible personal property, and is part of the total retail price to which general state and local sales and uses taxes apply."

B. Liquor Control Board Rule-Making.

Initiative 502 directed the LCB to develop and promulgate rules implementing Initiative 502 by December 1, 2013. As indicated above, the LCB is on track to issue final rules on November 16, 2013.

Proposed WAC 314-55-020(11) describes the license permit process and includes the following limitation:

> (11) The issuance or approval of a license shall not be construed as a license for, or an approval of, any violations of local rules or ordinances including, but not limited to: Building and fire codes, zoning ordinances, and business licensing requirements.

(Emphasis added.) In short, issuance of a license by LCB does not constitute approval of a marijuana production, processing or retail facility at a location banned by the city. This is a significant recognition by LCB of the land use regulation authority of cities and counties. The interpretation of the code and regulations by the agency charged with enforcing such codes and regulations is given deference by the courts. *Port of Seattle v. Pollution Control Hearings Board,* 151 Wash.2d 568, 90 P.3d 659 (2004) ("…the agency charged with interpreting and applying the water code, its interpretation of a provision deserves deference, so long as that interpretation is not contrary to the plain language of the statute").; *Cobra Roofing Service, Inc. v. Department of Labor and Industries,* 122 Wash. App. 402, 97 P.3d 17 (2004).

Proposed WAC 314-55-081 pertains to designation of the maximum number of retail outlets per county:

> **WAC 314-55-081 Who can apply for a marijuana retailer license?**
> (1) Using estimated consumption data and population data obtained from the office of financial management (OFM) population data, the liquor control board will determine the maximum number of marijuana retail locations per county.
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> The number of retail locations will be determined using a method that distributes the number of locations proportionate to the most populous cities within each county. Locations not assigned to a specific city will be at large. At large locations can be used for unincorporated areas in the county or in cities within the county that have no retail licenses designated. Once the number of locations per city and at large have been identified, the eligible applicants will be selected by lottery in the event the number of applications exceeds the allotted amount for the cities and county. Any lottery conducted by the board will be witnessed by an independent third party.
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> (2) The number of marijuana retail licenses determined by the board can be found on the liquor control board web site at www.liq.wa.gov.

> (3) Any entity and/or principals within any entity are limited to no more than three retail marijuana licenses with no multiple location licensee allowed more than thirty-three percent of the allowed licenses in any county or city.
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> (4) The board will initially limit the opportunity to apply for a marijuana retailer license to a thirty-day calendar window beginning with the effective date of this section. In order for a marijuana retailer license application to be considered it must be received no later than thirty days after the effective date of the rules adopted by the board. The board may reopen the marijuana retailer application window after the initial evaluation of the applications received and at subsequent times when the board deems necessary.

Under these rules, if a city enacts a ban on marijuana production, processing and retailing, the effect would be to convert the number of "assigned" retail licenses to "at large" licenses. These "at large" locations could used for unincorporated areas of the county "or in cities within the county that have no retail licenses designated." Thus, the enactment of a city-wide ban would not change the number of "maximum" retail licenses attributed to the county, but would simply rearrange "location" of the licensed sites and convert status from "assigned" to "at large."

C. Local Land Use Jurisdiction

The ability of cities to make and impose land use regulations is established in the state constitution. Constitution Article 11, § 11 provides: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." This authority was explained as follows:

> Municipalities are constitutionally vested with the authority to enact ordinances in furtherance of the public health, safety, morals, and welfare. However, "the plenary police power in regulatory matters accorded municipalities by Const. Art. 11, § 11, ceases when the state enacts a general law upon the particular subject, unless there is room for concurrent jurisdiction." *Lenci v. Seattle,* 63 Wash.2d 664, 669, 388 P.2d 926 (1964). Whether there is room for concurrent jurisdiction depends upon the legislative intent to be ascertained from an examination of the statute involved and the interaction between the state and local provisions. Where the Legislature does not specifically state its intent to occupy a given field, such intent can be inferred from "the purposes of the legislative enactment and ... the facts and circumstances upon which the enactment was intended to operate." *Lenci,* at 670, 388 P.2d 926.

Baker v. Snohomish County Dept. of Planning and Community Development, 68 Wash.App. 581, 585, 841 P.2d 1321, *review denied,* 121 Wash.2d 1027, 854 P.2d 1085 (1993); *Brown v. City of Yakima,* 116 Wash.2d 556, 807 P.2d 353 (1991)(citations omitted).

In *Baker,* the plaintiff had obtained a surface mining permit from the state Department of Natural Resources pursuant to provisions of the Surface Mining Act, Chapter 78.44

RCW ("SMA"), but the county code required a conditional use permit for surface mining use. The plaintiff alleged that the provisions of the SMA preempted the county's ability to require a conditional use permit. The court disagreed and upheld the county's conditional use permit requirement:

> In general, even when they address the same field of activity, the presumption is that state legislation and local legislation are concurrent in the absence of a direct conflict. Thus, although a subordinate legislative body may not prohibit something permitted by the superior legislative body, it may have the power to pass additional regulations which are not in direct conflict. In determining whether an ordinance is in conflict with general laws, the test is " 'whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa [.]' " *Employco Personnel Services, Inc. v. Seattle,* 117 Wash.2d 606, 618, 817 P.2d 1373 (1991) (quoting *Bellingham v. Schampera,* 57 Wash.2d 106, 111, 356 P.2d 292 (1960). Judged by such a test, an " 'ordinance is in conflict if it forbids that which the statute permits'." (Footnote omitted.) *Employco,* 117 Wash.2d at 618, 817 P.2d 1373 (quoting *Schampera,* 57 Wash.2d at 111, 356 P.2d 292). Snohomish County land use ordinances do not purport to forbid anything authorized by SMA, but at most to regulate the activity. Nor do they purport to authorize surface mining without a DNR permit. Nothing in the provisions of the SMA suggests any inherent or necessary conflict with local land use regulations. On the contrary, the act is almost totally directed to concerns of reclamation and gives no direction to DNR as to land use considerations. If one were to speculate on legislative purpose, it would appear more likely that the Legislature felt local land use regulation did not sufficiently address reclamation rather than that the Legislature wanted DNR to determine where surface mining could take place irrespective of local zoning regulations.
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> Another factor against preemption is that it is impossible to demonstrate in the abstract that the provisions of a DNR permit and the provisions of the Snohomish County land use ordinance are in conflict. The DNR has great flexibility in fixing the terms of its permit and the local agency likewise has a large measure of discretion in the terms to be required in a conditional use permit. Where any conflict is hypothetical and dependent upon the precise manner in which two discretionary permits were crafted, it is inappropriate to find preemption by implication. It is soon enough to find preemption when a conflict arises. There is no showing, nor even any attempt to show, that concurrent authority is not possible and, indeed, practical and feasible. It certainly was practical and feasible with respect to Baker's operation because he operated successfully under concurrent state and local regulation.

Baker, supra at 590-91.

In *Weden v. San Juan County,* 135 Wash.2d 678, 958 P.2d 273 (1998), the county commissioners adopted a ban on motorized personal watercraft ("PWC") in the marine waters of San Juan County. Owners of PWCs filed suit contending that the ban conflicted with the state's Recreational Vehicle Registration Law, Chapter 88.02 RCW and was thus in violation of Constitution Article XI, Section 11. The *Weden* court observed:

> Article XI, section 11 requires a local law yield to a state statute on the same subject matter if that statute "preempts the field, leaving no room for concurrent jurisdiction," or "if a conflict exists such that the two cannot be harmonized." *Brown v. City of Yakima,* 116 Wash.2d 556, 559, 561, 807

P.2d 353 (1991). Respondents do not argue that the Legislature has preempted the field of conduct governed by the Ordinance but, rather, contend the Ordinance conflicts with various state laws.

> ' "In determining whether an ordinance is in 'conflict' with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Village of Struthers v. Sokol,* 108 Ohio St. 263, 140 N.E. 519 [(1923)]. Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits,' *State v. Carran,* 133 Ohio St. 50, 11 N.E.2d 245, 246 [(1937)].

City of Bellingham v. Schampera, 57 Wash.2d 106, 111, 356 P.2d 292, 92 A.L.R.2d 192 (1960). An ordinance must yield to state law only "if a conflict exists such that the two cannot be harmonized." *Brown,* 116 Wash.2d at 561, 807 P.2d 353; *accord Schampera,* 57 Wash.2d at 111, 356 P.2d 292 ("Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail. *Bodkin v. State,* [132 Neb. 535], 272 N.W. 547 [(1937)]."). In this case, we must examine whether the Ordinance conflicts with chapter 88.02 RCW, chapter 88.12 RCW, chapter 90.58 RCW, chapter 43.99 RCW, or the public trust doctrine.

Weden, supra at 693. Addressing the claims of the PWC owners, the court held:

> The trial court found the Ordinance conflicted with chapter 88.02 RCW, the state vessel registration statute. In essence, the trial court found that the Ordinance forbid an activity the statute impliedly allowed.
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> We have previously addressed a similar argument and established an analysis to be followed. In *State ex rel. Schillberg v. Everett Dist. Justice Court,* 92 Wash.2d 106, 594 P.2d 448 (1979), we reviewed a Snohomish County ordinance that prohibited the use of internal combustion motors on "certain lakes" in Snohomish County. *Schillberg,* 92 Wash.2d at 107, 594 P.2d 448. A person charged with violating the statute challenged the law "on the ground that it conflict[ed] with [chapter 88.12 RCW]." *Schillberg,* 92 Wash.2d at 107, 594 P.2d 448. We found no conflict and stated:
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> > The provisions of [chapter 88.12 RCW] are concerned with safe operation of motor boats and do not in any way grant permission to operate boats in any place. A statute will not be construed as taking away the power of a municipality to legislate unless this intent is clearly and expressly stated....
> >
> > There being no express statement nor words from which it could be fairly inferred that motor boats are permitted on all waters of the state, no conflict exists and the ordinance is valid.
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> *Schillberg,* 92 Wash.2d at 108, 594 P.2d 448 (citations omitted). *Schillberg* certainly lays to rest any claim that the Ordinance conflicts with chapter 88.12 RCW. However, we hold *Schillberg*controls the discussion of whether the Ordinance conflicts with the state's vessel registration statute, chapter 88.02 RCW.
>
> The Legislature did not enact chapter 88.02 RCW to grant PWC owners the right to operate their PWC anywhere in the state. The statute was enacted to raise tax revenues and to create a title system for boats. *See* RCW 88.02.120. RCW 88.02.020 provides, in pertinent part: "Except as provided in this chapter, no person may own or operate any vessel on the waters of this state

> unless the vessel has been registered and displays a registration number and a valid decal in accordance with this chapter....” On its face, the statute prohibits operation of an unregistered vessel. Nowhere in the language of the statute can it be suggested that the statute creates an unabridged right to operate PWC in all waters throughout the state.
>
> Registration of a vessel is nothing more than a precondition to operating a boat. No unconditional right is granted by obtaining such registration. Statutes often impose preconditions which do not grant unrestricted permission to participate in an activity. Purchasing a hunting license is a precondition to hunting, but the license certainly does not allow hunting of endangered species, RCW 77.16.120, or hunting inside the Seattle city limits, *see* Seattle Municipal Code 12A.14.071 (banning discharge of a firearm). Reaching the age of 16 is a precondition to driving a car, but reaching 16 does not create an unrestricted right to drive a car however and wherever one desires.
>
> *Schillberg* states that the Legislature must *expressly* indicate an intent to preempt a particular field. In this case, the registration statute does not contain language preempting the regulation of this activity to the State. *See* RCW 46.08.020. We “will not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is the legislative intent.” *Southwick, Inc. v. City of Lacey,* 58 Wash.App. 886, 891-92, 795 P.2d 712 (1990). The San Juan County Ordinance does not conflict with the state’s vessel registration statute; it is a routine application of the police power.

Weden, supra at 694-95 (footnotes omitted).

There is no provision in Initiative 502 *requiring* a city to allow marijuana producers, processors, or retail outlets within its jurisdiction. There is also no express provision preempting the city’s ability to regulate location of marijuana producing, marijuana processing and marijuana retail operations. As in *Weden*, the issuance of a license to produce, process or retail marijuana is a *precondition* to such use, but does not then automatically allow such use anywhere in the state. Thus, the city should retain its ability to either (a) ban such uses, or (b) establish appropriate zoning controls over these uses. Zoning controls could include reasonable “proximity” limitations – governing proximity to public parks, schools, libraries, residential districts and other public places.[4]

Such provisions would not conflict with the licensing provisions of the Liquor Control Board – unless the restrictions had the effect of eliminating all marijuana production, processing or retailing opportunities *in the county,* or restricting the number of retail sites available in the county to a number less than authorized by the LCB.

[4] I-502 itself (Section 6(8) and Section 18) restrict location and “advertising” of marijuana outlets within “one thousand feet of the perimeter of a school grounds, playground, recreation center or facility, child care center, public park, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older.” The Initiative also prohibits advertising on public transit vehicles and shelters, as well as “on or in a publicly owned or operated property.” These provisions are analogous to the land use regulation of adult businesses.

D. Business Licensing and Regulation

On the question of whether a city could adopt regulations pertaining to the business licensing, or regulating the operation, of marijuana producers, processors or retailers, a substantial risk of conflict exists. The LCB has adopted a comprehensive licensing and regulatory scheme for these operations. A prudent observation is that the LCB has, indeed, preempted the *licensing* of marijuana producers, processors and retailers, and has established detailed requirements for the operation of such functions. However, preemption of licensing does not mean that Initiative 502 or the LCB regulations have preempted the local land use jurisdiction of the city.

A further reason to counsel caution in the area of business licensing is the conflict between federal and state law regarding marijuana. As noted above, marijuana (for any purpose) is an illegal drug listed as a Schedule I controlled substance under the federal *Controlled Substances Act*, 21 U.S.C. § 801-971 (Section 812(c)). Strictly speaking, Initiative 502 authorizes production, processing, sale, possession and use of marijuana in violation of the federal law. It remains a risk that the U.S. Department of Justice may initiate an enforcement action if it determines that a local production, processing or retail operation is not being vigorously enforced under state law and is distributing illegal substances to minors or to an illicit market.[5]

In the realm of medical marijuana, Initiative Measure No. 692, approved by the voters of Washington State on November 30, 1998 and now codified as Chapter 69.51A RCW, is entitled the "Washington State Medical Use of Marijuana Act" (hereafter the "Medical Use of Marijuana Act" or "MUMA"). MUMA creates an affirmative defense for "qualifying patients" to the charge of possession of marijuana, and provides that such patients can, as an alternative to growing marijuana for their own use, designate a "designated provider" who can provide (not sell) medical marijuana to "only one patient at a time."

MUMA did not create any mechanism for the establishment or operation of "dispensaries," either storefront or regulated by state or local agencies. Consequently, the consensus of opinion, including that of the Washington State Department of Health, was that dispensaries were not legal or authorized under MUMA.

In 2011, the Legislature adopted E2SSB 5073. As originally passed by the Legislature, the bill contained extensive provisions that provided for state registration and licensing of medical marijuana dispensaries, and further authorized the formation of "collective gardens." A "collective garden" allows up to ten (10) "qualified patients" to jointly

[5] *Memorandum,* U.S. Attorney's Office, "Guidance Regarding Marijuana Enforcement" (August 29, 2013).

operate a medical marijuana grow operation, with up to 15 marijuana plants per person (up to a total maximum of 45 plants per garden).

The Governor vetoed the provisions of E2SSB 5073 pertaining to "dispensaries" and other provisions – essentially on the grounds that, under existing federal law, marijuana in all forms is a Schedule I controlled substance subject to prosecution. Her concern was that, under the bill as written, state employees charged with administering the licensing of medical marijuana dispensaries could be prosecuted for violation of the federal Controlled Substances Act. Because of this veto, no meaningful provisions remain in MUMA authorizing medical marijuana "dispensaries." Thus, the rationale remains that dispensaries continue to be illegal – or at least without statutory sanction.[6]

Regarding "collective gardens," no statutory provisions provide mandatory directives regarding local land use regulation, zoning limitations or business regulation. Consequently, these matters are subject to local regulation and control. Section 1102 of E2SSB 5073 expressly preserved the ability of local governments to regulate medical marijuana facilities and operations:

> **NEW SECTION. Sec. 1102.** (1) Cities and towns may adopt and enforce any of the following pertaining to the production, processing, or dispensing of cannabis or cannabis products within their jurisdiction: Zoning requirements, business licensing requirements health and safety requirements, and business taxes. Nothing in this act is intended to limit the authority of cities and towns to impose zoning requirements or other conditions upon licensed dispensers, *so long as such requirements do not preclude the possibility of siting licensed dispensers within the jurisdiction*.[7] If the jurisdiction has no commercial zones, the jurisdiction is not required to adopt zoning to accommodate licensed dispensers.

With the Governor's veto of the provisions of E2SSB 5073 regarding licensing and registration of "dispensaries," the underlined clause above was found by the Governor to be "without meaning." E2SSB 5073, Governor's Veto Message, page 43. Consequently, an argument exists that, under MUMA and in light of federal law,

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[6] However, on July 18, 2011, the City of Seattle adopted Council Bill No. 117229. The Bill recites the existing federal prohibitions on marijuana, but acknowledges the city's "low priority" regarding investigation and prosecution of marijuana offenses (per Initiative 75 adopted by Seattle voters on September 16, 2003). The Bill acknowledges the existence of "numerous" medical marijuana dispensaries within the City of Seattle, and states that medical marijuana dispensaries would be permitted, subject to compliance with existing zoning regulations, health and safety codes, building codes, etc.

[7] The highlighted language was the subject of a portion of the Governor's veto message. Her conclusion was that, with the veto of all provisions of E2SSB 5073 regarding licensing of "dispensaries," the underlined portion had no effect ("The provisions in Section 1102 that local governments' zoning requirements cannot 'preclude the possibility of siting licensed dispensers within the jurisdiction' are without meaning in light of the vetoes of sections providing for such licensed dispensers. It is with this understanding that I approve Section 1102.")(E2SSB 5073, page 43).

dispensaries remain illegal. In consideration of the above, the City Council of the City of Yakima in 2012 adopted the following amendment to Chapter 15.01 YMC:

> **15.01.035 Illegal uses prohibited.**
>
> A. General. No use that is illegal under local, state or federal law shall be allowed in any zone within the city.
>
> B. Specific Application—Medical Marijuana Dispensaries and Collective Gardens. Until such time that this code is amended to provide specific provisions and land use controls allowing and regulating dispensaries of cannabis and/or collective gardens for the production, distribution and dispensing of cannabis for medical uses, all as further defined and set forth in Chapter 69.51A RCW and E2SSB 5073, Laws of 2011 of the State of Washington, such uses are not allowed in any zone within the city. For purposes of this section, "dispensary" means any person, entity, site, location, facility, business, cooperative, collective, whether for profit or not for profit, that distributes, sells, dispenses, transmits, packages, measures, labels, selects, processes, delivers, exchanges or gives away cannabis for medicinal or other purposes. (Ord. 2012-03 § 2, 2012).

A significant ruling in the area of medical marijuana and a city's ability to exercise its land use jurisdiction to ban medical marijuana was recently issued by the Supreme Court of California. In *City of Riverside v. Inland Empire Patients Health and Welfare Center,* 56 Cal.4th 729, 300 P.3d 494 (2013), the court ruled:

> The issue in this case is whether California's medical marijuana statutes preempt a local ban on facilities that distribute medical marijuana. We conclude they do not.
>
> Both federal and California laws generally prohibit the use, possession, cultivation, transportation, and furnishing of marijuana. However, California statutes, the Compassionate Use Act of 1996 (CUA; Health & Saf.Code, Section 11362.5, added by initiative, Prop. 15, as approved by voters, Gen. Elec. (Nov. 5, 1996)) and the more recent Medical Marijuana Program (MMP; § 11362.7 et seq., added by Stats. 2003, ch. 875, § 2, pp. 6422, 6424), have removed certain state law obstacles from the ability of qualified patients to obtain and use marijuana for legitimate medical purposes. Among other things, these statutes exempt the "collective[ ] or cooperative[ ] cultiva[tion]" of medical marijuana by qualified patients and their designated caregivers from prosecution or abatement under specified state criminal and nuisance laws that would otherwise prohibit those activities. (§ 11362.775.)
>
> The California Constitution recognizes the authority of cities and counties to make and enforce, within their borders, "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) This inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders, and preemption by state law is not lightly presumed.
>
> In the exercise of its inherent land use power, the City of Riverside (City) has declared, by zoning ordinances, that a "[m]edical marijuana dispensary"—"[a] facility where marijuana is made available for medical purposes in accordance with" the CUA (Riverside Municipal Code (RMC), § 19.910.140)—is a prohibited use of land within the city and may be abated as a public nuisance. (RMC, §§ 1.01.110E, 6.15.020Q, 19.150.020 & table 19.150.020 A.) The City's ordinance also

> bans, and declares a nuisance, any use that is prohibited by federal or state law. (RMC, §§ 1.01.110E, 6.15.020Q, 9.150.020.)
>
> Invoking these provisions, the City brought a nuisance action against a facility operated by defendants. The trial court issued a preliminary injunction against the distribution of marijuana from the facility. The Court of Appeal affirmed the injunctive order. Challenging the injunction, defendants urge, as they did below, that the City's total ban on facilities that cultivate and distribute medical marijuana in compliance with the CUA and the MMP is invalid. Defendants insist the local ban is in conflict with, and thus preempted by, those state statutes.
>
> As we will explain, we disagree. We have consistently maintained that the CUA and the MMP are but incremental steps toward freer access to medical marijuana, and the scope of these statutes is limited and circumscribed. They merely declare that the conduct they describe cannot lead to arrest or conviction, or be abated as a nuisance, as violations of enumerated provisions of the Health and Safety Code. Nothing in the CUA or the MMP expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders. We must therefore reject defendants' preemption argument, and must affirm the judgment of the Court of Appeal.

City of Riverside, supra at 737-38 (footnotes omitted). The court concluded:

> We thus conclude that neither the CUA nor the MMP expressly or impliedly preempts the authority of California cities and counties, under their traditional land use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana, and to enforce such policies by nuisance actions. Accordingly, we reject defendants' challenge to Riverside's MMD ordinances.
>
> As we have noted, the CUA and the MMP are careful and limited forays into the subject of medical marijuana, aimed at striking a delicate balance in an area that remains controversial, and involves sensitivity in federal-state relations. We must take these laws as we find them, and their purposes and provisions are modest. They remove state-level criminal and civil sanctions from specified medical marijuana activities, but they do not establish a comprehensive state system of legalized medical marijuana; or grant a "right" of convenient access to marijuana for medicinal use; or override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries.

City of Riverside, supra at 762-63 (footnotes omitted). Like California, MUMA removed criminal sanctions from qualified patients and physicians who complied with the law. California constitutional provisions and statutes closely mirror those of the State of Washington with regard to local legislation and preemption. Therefore, the reasoning used by the *City of Riverside* court in upholding the city's ban of medical marijuana dispensaries supports the city's jurisdiction to ban medical marijuana dispensaries and collective gardens.

Business licensing – essentially the regulation and positive issuance of a permit to conduct a business in violation of federal law – is especially problematic. Courts in other jurisdictions have held that local legislation authorizing conduct and uses in violation of

the federal Controlled Substances Act are in conflict with such federal legislation and thus preempted by the federal law (*cf., Emerald Steel Fabricators v. Bureau of Labor and Industries,* 348 Or. 159, 230 P.3d 518 (2010)). In *Emerald,* the court held that a provision of Oregon Medical Marijuana Act affirmatively authorizing the use of medical marijuana was preempted by Federal Controlled Substances Act, which explicitly prohibited marijuana use without regard to medicinal purpose.

E. City of Yakima – Current Code

The provisions in YMC 15.01.035 prohibit any use within the City of Yakima that is illegal under local, state or federal law. Recreational use of marijuana remains unlawful under federal law. Under current code, the production, processing, sale and use of marijuana for any purpose would not be permitted.

The current code thus operates as a form of "moratorium" enacted as code. The provisions of YMC 15.01.035 are not in conflict with the federal Controlled Substances Act, as both the local code and federal law prohibit such use of marijuana.

The issue will be whether YMC 15.01.035 "conflicts" with the general law of Initiative 502 and is thus preempted. In this regard, several factors argue that maintaining the ban would not conflict with Initiative 502:

- Initiative 502 does not expressly state that it preempts the field with regard to land use regulation of marijuana production, processing and retailing. (The Initiative, however, does preempt the field with regard to criminal prosecution for use or possession of marijuana in the amounts decriminalized by the Initiative.)

- The only mandate placed upon the Liquor Control Board is to adopt rules defining the maximum number of retail outlets "in each county" of the State of Washington. There is no minimum or maximum number of retail outlets mandated for cities within such counties. Conceivably, a city may ban such use, leaving the locations for retail outlets confined to the county (or other cities that have not banned such use).

- Any legislation by the city that bans marijuana production, processing and retailing within the city limits does not "prohibit what the legislature has allowed," because the Initiative does not mandate that any of these production, processing or retailing functions occur within any city. The Initiative speaks to a maximum number of retail outlets that "may" be located within each county of the state. If such uses are banned in any

city, the purposes of the Initiative are not frustrated because such uses can be located within the county (or in any other city in which they are not banned).

- There is no mandate at all in the Initiative regarding a minimum number of producers or processors anywhere within the state.

- There is no express provision of the Initiative stating that cities cannot ban such operations from the city.

- While the provisions of the Initiative arguably preempt the field of business licensing of marijuana producers, processors and retailers, the provisions of YMC 15.01.035 deal with land uses within the city – not business licensing.

- Under the Supremacy Clause of the federal Constitution, federal law will prevail over any conflicting state or local law. Federal law currently lists marijuana as a Schedule I controlled substance.

F. Recommendation

With these parameters in mind, the following options are available:

(a) Maintain Status Quo.

Status quo means that YMC 15.01.035 remains in effect as originally adopted. Thus, no use that is illegal under local, state or federal law will be allowed in the city. This code section contains a specific ban for medical marijuana dispensaries and collective gardens, but no specific language is used to ban production, processing and retailing of "recreational marijuana."

(b) Amend Current Code to Ban Production, Processing and Retailing of Recreational Marijuana.

This option entails an amendment of YMC 15.01.035 to add a new subsection specifically banning the production, processing and retailing of marijuana within the City of Yakima. This is preferable to simply maintaining the status quo discussed in option (a) above in that it provides further clarity and precision and is consistent with the current subsection banning medical marijuana dispensaries

and collective gardens. This option entails an amendment to Title 15 YMC and would require public hearings before the Planning Commission and City Council. It would be advisable to adopt the amendment to be effective on or before November 30, 2013.

(c) Develop and Adopt Land Use (Zoning) Controls for Production, Processing and Retailing of Recreational Marijuana and/or Medical Marijuana.

The city may develop zoning codes defining areas where marijuana production, processing and/or retailing may be conducted. For example, it is possible to limit such activities to industrial or commercial zones, or an overlay zone within an industrial zone, or other areas. Licensed marijuana production, processing and retailing would remain subject to the 1,000-foot limitations of Initiative 501, and would also be subject to the city's designated zoning requirements. Likewise, the City Council may wish to consider appropriate zoning designations for medical marijuana dispensaries and collective gardens. If any of these zoning options are considered, amendments to the city's zoning codes (Title 15 YMC) will require public hearings before the Planning Commission and City Council. Because the LCB indicates it will begin issuing marijuana production, processing and retail licenses on December 1, 2013, any ordinance amending the city's zoning codes would have to be adopted so as to be effective no later than November 30, 2013.